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<PREAMB>

<AGENCY TYPE='S'>DEPARTMENT OF DEFENSE

<AGENCY TYPE='O'>GENERAL SERVICES ADMINISTRATION

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<CFR>48 CFR Parts 4 and 17

<DEPDOC>[FAC 2005-62; FAR Case 2012-010; Item II; Docket 2012-0010, Sequence 01]

<RIN>RIN 9000-AM36

<SUBJECT>Federal Acquisition Regulation; Interagency

Acquisitions: Compliance by Nondefense Agencies with Defense  
Procurement Requirements

**AGENCY:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Interim rule.

**SUMMARY:** DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to add new requirements specific to the acquisition of supplies and services by nondefense agencies on behalf of the DoD. This rule implements a section of the National Defense Authorization Act for Fiscal Year 2008, with later amendments.

**DATES:** Effective date: [Insert date of publication in the FEDERAL REGISTER.]

Comment date: Interested parties should submit written comments to the Regulatory Secretariat on or before **[insert date 60 days after FEDERAL REGISTER publication date]** to be considered in the formation of a final rule.

**ADDRESSES:** Submit comments identified by FAC 2005-62, FAR Case 2012-010, by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by searching for "FAR Case 2012-010". Select the link "Submit a Comment" that corresponds with "FAR Case 2012-010."

Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "FAR Case 2012-010" on your attached document.

- Fax: 202-501-4067.

- Mail: General Services Administration, Regulatory Secretariat (MCVB), ATTN: Hada Flowers, 1275 First Street, NE, 7th Floor, Washington, DC 20417.

Instructions: Please submit comments only and cite FAC 2005-62, FAR Case 2012-010 in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT:** Ms. Patricia Corrigan, Procurement Analyst, at 202-208-1963 for clarification of

content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAC 2005-62, FAR Case 2012-010.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD, GSA, and NASA are publishing this interim rule amending the FAR to implement the requirements of section 801 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008 (Pub. L. 110-181), as amended, (10 U.S.C. 2304 note).

Section 801 of the NDAA for FY 2008, titled "Internal Controls for Procurement on Behalf of the Department of Defense by Certain Nondefense Agencies," defines in general terms the "procurement policies, procedures, and internal controls" that constitute compliance with defense procurement requirements by a nondefense agency when it procures supplies and services on behalf of the DoD.

Section 801(b) states, in part, that unless waived, a DoD acquisition official may place an order, make a purchase, or otherwise procure property or services for DoD in excess of the simplified acquisition threshold through a nondefense agency only if the nondefense agency conducting the acquisition on DoD's behalf has certified that it will

comply with defense procurement requirements for that fiscal year.

Section 804 of the Duncan Hunter NDAA for FY 2009 (Pub. L. 110-417) amended the list of covered nondefense agencies established in previous NDAA's, and established deadlines for reviews of covered nondefense agencies. (The term "covered nondefense agency" is included in the definition of nondefense agencies of section 801 of the NDAA for FY 2008.)

Section 806 of the NDAA for FY 2010 (Pub. L. 111-84), titled "Treatment of Nondefense Agency Procurements Under Joint Programs with Intelligence Community," amended section 801(b) of the NDAA for FY 2008 by authorizing exclusions from section 801 internal control limitations for contracts entered into under joint programs for DoD and non-DoD elements of the intelligence community.

Section 817 of the NDAA for FY 2012 (Pub. L. 112-81), titled "Compliance with Defense Procurement Requirements for Purposes of Internal Controls of Nondefense Agencies for Procurements of Behalf of the Department of Defense," amended section 801(d) of the NDAA for FY 2008 (10 U.S.C. 2304 note) to provide clarifying language that identifies the types of laws and regulations with which nondefense departments and agencies must comply when procuring

supplies and services on behalf of DoD. Specifically, section 817 clarifies that the nondefense agency certification of "compliance with defense procurement requirements" for a given fiscal year means compliance with (1) the FAR and other laws and regulations that apply to procurements of property and services by Federal agencies, and (2) laws and regulations (including DoD financial management regulations) that apply to procurements of property and services made by DoD through other Federal agencies.

This interim rule makes the following changes:

- Clarifies FAR 4.603(c) regarding the allocation of socioeconomic credit to the requesting agency for assisted acquisitions.
- Adds to FAR 17.500(a) a cross-reference to the new FAR subpart 17.7 for additional requirements for nondefense agencies when acquiring supplies and services on behalf of DoD;
- Adds to FAR 17.502-1(b)(1)(i) a requirement for written confirmation by the requesting agency to the servicing agency in the event there are no agency unique requirements beyond the FAR that apply to an assisted acquisition.

- Cross-references new FAR subpart 17.7, Interagency Acquisitions: Acquisitions by Nondefense Agencies on Behalf of the Department of Defense, at 17.502-1(b)(1)(i) related to assisted acquisitions.

- Creates a new FAR subpart FAR 17.7 applicable to the acquisition of supplies and services by nondefense agencies on behalf of DoD.

- Creates a new FAR section 17.700 identifying the scope of the subpart.

- Creates a new FAR section 17.701 providing definitions specific to subpart 17.7.

- Creates a new FAR section 17.702 establishing the subpart's applicability to all acquisitions made by nondefense agencies on behalf of DoD except for contracts for joint projects with DoD entered into by a nondefense agency that is an element of the intelligence community.

- Creates a new FAR section 17.703, which establishes the policy related to internal controls and compliance certification under which nondefense agencies may procure supplies and services on behalf of DoD and identifies DoD acquisition official responsibilities when making acquisitions on behalf of DoD.

## **II. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

### **III. Regulatory Flexibility Act**

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act 5 U.S.C. 601, et seq. Nevertheless, an Initial Regulatory Flexibility Analysis (IRFA) has been prepared and is summarized as follows.

Section 801 of the NDAA for FY 2008 (Pub. L. 110-181), section 806 of the NDAA for FY 2010 (Pub. L. 111-84), and section 817 of the NDAA for FY 2012 (Pub. L. 112-81) address requirements specific to the acquisition of supplies and services by nondefense agencies on behalf of DoD, and are, therefore, internal to the Government.

However, this case also adds a clarification at FAR 4.603(c), restating existing Office of Federal Procurement Policy (OFPP) and Federal Procurement Data System (FPDS) policy regarding the allocation of socioeconomic credit for interagency acquisitions. Although DoD, GSA, and NASA do not expect the clarification to have a direct economic impact on a substantial number of small entities, there is the possibility that the regulatory clarification may improve the accuracy of FPDS data submissions related to the allocation of socioeconomic credit to agencies for contracts and orders awarded to a substantial number of small entities. Improved data accuracy can have a positive impact on agencies' annual small business goals.

The Regulatory Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule consistent with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005-62, FAR Case 2012-010) in correspondence.

#### **IV. Paperwork Reduction Act**

The interim rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. Chapter 35).



## **V. Determination to Issue an Interim Rule**

Pursuant to the Office of Federal Procurement Policy (OFPP) Reauthorization Act, the Secretary of Defense, the Administrator of General Services, and the Administrator of NASA have determined that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the NDAA for FY 2012 (Pub. L. 112-81) was enacted on December 31, 2011, and was effective upon enactment. Recognizing this, the FAR Principals opened FAR Case 2012-010 on January 19, 2012. Section 817 of the NDAA for FY 2012 amended section 801(d) of the NDAA for FY 2008 (10 U.S.C. 2304 note) to provide necessary clarifying language that identifies the types of laws and regulations with which nondefense departments and agencies must comply when procuring supplies and services on behalf of DoD. Specifically, section 817 clarifies that the nondefense agency certification of "compliance with defense procurement requirements" for a given fiscal year means compliance with (1) the FAR and other laws and regulations that apply to procurements of property and services by Federal agencies, and (2) laws and regulations (including DoD financial management regulations) that apply to procurements of property and services made by DoD through

other Federal agencies. If this rule, which also informs nondefense agencies regarding their responsibilities when buying on behalf of DoD, is not implemented as an interim rule, it will negatively impact the accuracy and completeness of nondefense agency certifications for fiscal year 2013.

Every effort has been made to process this FAR requirement in an expeditious manner. Processing this rule as an interim rule, with an immediate effective date, will ensure that nondefense agencies conducting acquisitions on behalf of DoD are fully informed of DoD expectations and their responsibilities when nondefense agency senior management completes the statutorily-mandated certifications for fiscal year 2013. This requirement does not directly impact the public and is purely an administrative FAR change that affects Government agencies that conduct acquisitions on behalf of DoD.

However, pursuant to 41 U.S.C. 1707 and FAR 1.501-3(b), DoD, GSA, and NASA will consider public comments received in response to this interim rule in the formation of the final rule.

**List of Subjects in 48 CFR Parts 4 and 17**

Government procurement.

**Dated:** November 9, 2012

LAURA AULETTA,  
Director,  
Office of Governmentwide  
Acquisition Policy,  
Office of Acquisition Policy,  
Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 4 and 17 as set forth below:

1. The authority citation for 48 CFR parts 4 and 17 is revised to read as follows:

**AUTHORITY:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

#### **PART 4-ADMINISTRATIVE MATTERS**

2. Amend section 4.603 by adding two sentences to the end of paragraph (c) to read as follows:

##### **4.603 Policy.**

\* \* \* \* \*

(c) \* \* \* For assisted acquisitions, the requesting agency will receive socioeconomic credit for meeting agency small business goals, where applicable. Requesting agencies shall provide the appropriate agency/bureau component code as part of the written interagency agreement between the requesting and servicing agencies (see 17.502-1(b)(1)).

\* \* \* \* \*

#### **PART 17-SPECIAL CONTRACTING METHODS**

3. Amend section 17.500 by adding a new sentence to the end of paragraph (a) to read as follows:

##### **17.500 Scope of subpart.**

(a) \* \* \* In addition to complying with the interagency acquisition policy and procedures in this subpart, nondefense agencies acquiring supplies and services on behalf of the Department of Defense shall also comply with the policy and procedures at subpart 17.7.

\* \* \* \* \*

4. Amend section 17.502-1 by revising paragraph (b)(1)(i) to read as follows:

**17.502-1 General.**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(i) Prior to the issuance of a solicitation, the servicing agency and the requesting agency shall both sign a written interagency agreement that establishes the general terms and conditions governing the relationship between the parties, including roles and responsibilities for acquisition planning, contract execution, and administration and management of the contract(s) or order(s). The requesting agency shall provide to the servicing agency any unique terms, conditions, and applicable agency-specific statutes, regulations, directives, and other applicable requirements for incorporation into the order or contract. In the event

there are no agency unique requirements beyond the FAR, the requesting agency shall so inform the servicing agency contracting officer in writing. For acquisitions on behalf of the Department of Defense, also see subpart 17.7. For patent rights, see 27.304-2. In preparing interagency agreements to support assisted acquisitions, agencies should review the Office of Federal Procurement Policy guidance, Interagency Acquisitions, available at [http://www.whitehouse.gov/omb/assets/procurement/iac\\_revise\\_d.pdf](http://www.whitehouse.gov/omb/assets/procurement/iac_revise_d.pdf).

\* \* \* \* \*

5. Add Subpart 17.7 to read as follows:

**Subpart 17.7—Interagency Acquisitions: Acquisitions by  
Nondefense Agencies on Behalf of the Department of Defense**

**Sec.**

17.700 Scope of subpart.  
17.701 Definitions.  
17.702 Applicability.  
17.703 Policy.

**Subpart 17.7—Interagency Acquisitions: Acquisitions by  
Nondefense Agencies on Behalf of the Department of Defense**

**17.700 Scope of subpart.**

(a) Compliance with this subpart is in addition to the policies and procedures for interagency acquisitions set forth in subpart 17.5. This subpart prescribes policies and procedures specific to acquisitions of supplies and

services by nondefense agencies on behalf of the Department of Defense (DoD).

(b) This subpart implements Pub. L. 110-181, section 801, as amended (10 USC 2304 Note).

#### **17.701 Definitions.**

As used in this subpart—

Department of Defense (DoD) acquisition official means—

- (1) A DoD contracting officer; or
- (2) Any other DoD official authorized to approve a direct acquisition or an assisted acquisition on behalf of DoD.

Nondefense agency means any department or agency of the Federal Government other than the Department of Defense.

Nondefense agency that is an element of the intelligence community means the agencies identified in 50 U.S.C. 401a(4), which include the—

- (1) Office of the Director of National Intelligence;
- (2) Central Intelligence Agency;
- (3) Intelligence elements of the Federal Bureau of Investigation, Department of Energy, and Drug Enforcement Agency;
- (4) Bureau of Intelligence and Research of the Department of State;

(5) Office of Intelligence and Analysis of the Department of the Treasury;

(6) The Office of Intelligence and Analysis of the Department of Homeland Security and the Office of Intelligence of the Coast Guard; and

(7) Such other elements of any department or agency as have been designated by the President, or designated jointly by the Director of National Intelligence and the head of the department or agency concerned, as an element of the intelligence community.

**17.702 Applicability.**

This subpart applies to all acquisitions made by nondefense agencies on behalf of DoD. It does not apply to contracts entered into by a nondefense agency that is an element of the intelligence community for the performance of a joint program conducted to meet the needs of DoD and the nondefense agency.

**17.703 Policy.**

(a) A DoD acquisition official may request a nondefense agency to conduct an acquisition on behalf of DoD in excess of the simplified acquisition threshold only if the head of the nondefense agency conducting the acquisition on DoD's behalf has certified that the agency will comply with defense procurement requirements for that



fiscal year except when waived in accordance with paragraph (e) of this section.

(b) A nondefense agency is compliant with defense procurement requirements if the procurement policies, procedures, and internal controls of the nondefense agency applicable to the procurement of supplies and services on behalf of DoD, and the manner in which they are administered, are adequate to ensure the compliance of the nondefense department or agency with—

(1) The Federal Acquisition Regulation and other laws and regulations that apply to procurements of supplies and services by Federal agencies; and

(2) Laws and regulations that apply to procurements of supplies and services made by DoD through other Federal agencies, including DoD financial management regulations, the Defense Federal Acquisition Regulation Supplement (DFARS), and the DFARS Procedures, Guidance, and Information (PGI). (The DFARS and PGIs are accessible at: <http://www.acq.osd.mil/dpap/>).

(c) Within 30 days of the beginning of each fiscal year, submit nondefense agency certifications of compliance to the Director, Defense Procurement and Acquisition Policy, Department of Defense, 3060 Defense Pentagon, Washington D.C. 20301-3060.

(d) The DoD acquisition official, as defined at 17.701, shall provide to the servicing nondefense agency contracting officer any DoD-unique terms, conditions, other related statutes, regulations, directives, and other applicable requirements for incorporation into the order or contract. In the event there are no DoD-unique requirements beyond the FAR, the DoD acquisition official shall so inform the servicing nondefense agency contracting officer in writing. Nondefense agency contracting officers are responsible for ensuring support provided in response to DoD's request complies with paragraph (b) of this section.

(e) Waiver. The limitation in paragraph (a) of this section shall not apply to the acquisition of supplies and services on behalf of DoD by a nondefense agency during any fiscal year for which the Under Secretary of Defense for Acquisition, Technology, and Logistics has determined in writing that it is necessary in the interest of DoD to acquire supplies and services through the nondefense agency during the fiscal year. The written determination shall identify the acquisition categories to which the waiver applies.

(f) Nondefense agency certifications, waivers, and additional information are available at

[http://www.acq.osd.mil/dpap/cpic/cp/interagency\\_acquisition](http://www.acq.osd.mil/dpap/cpic/cp/interagency_acquisition.html)  
[.html](#).

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